LIFE PLAZA SDN BHD

v.

PASUKHAS CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[SUIT NO: 22NCVC-1230-12/2011]
1 MARCH 2012

ARBITRATION: *Stay of proceedings - Stay pending arbitration, application for - Whether agreement contained arbitration clause - Entry of unconditional appearance - Whether amounted to taking positive steps in proceedings and waiving right to refer dispute to arbitration - Filing of defence on express instructions of court - Whether indicative of unequivocal intention to proceed with suit - Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd - Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor - Arbitration Act 2005, s. 10*

The plaintiff claimed against the defendant for a certain sum as liquidated and ascertained damages (LAD) for the late completion of a project. *Vide* summons in chambers (encl. 4), the defendant applied for a stay of all proceedings in this case pending remission to arbitration pursuant to s. 10 of the Arbitration Act 2005. The defendant's application was premised on its claim that the construction agreement between the parties contained an arbitration clause. According to the defendant's project manager, the plaintiff and the defendant had agreed in cl. 1 of the Letter of Award to adopt the Building Contract (Private Edition with Quantities) ("PAM Contract") and that pursuant to cl. 34.1 of the PAM Contract, the parties had agreed to refer any dispute relating to the project to arbitration. It was the plaintiff's case that (i) the PAM contract did not bind the parties as it was a separate contract from the Letter of Offer and would need to be signed by both before it could bind the parties; (ii) that the defendant had taken various steps in the proceedings before making the application for stay and by such actions had submitted to the jurisdiction of the court and waived its right to refer the dispute to arbitration; (iii) the defendant should have filed its application for stay before the due date for filing the defence.

Held (allowing prayers (a) and (b) of encl. 4):

(1) *Vide* the letter of award duly executed by the parties, there was a clear agreement to incorporate the PAM Form with Quantities. And pursuant to cl. 34.1 of the PAM Contract, the parties had agreed to refer any dispute between them to arbitration. It was not necessary for the letter of award itself to have an arbitration clause *(Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd)*. The adoption of the PAM Contract in the Letter of Award and the existence of an arbitration clause in the PAM Contract was sufficient for the court to arrive at the conclusion that the agreement between the parties in this case did contain an arbitration clause. (paras 17 & 18)

(2) The entry of unconditional appearance by the defendant herein did not amount to it having taken positive steps in the proceedings which would deny it the right to apply for a stay of proceedings pending remission to arbitration *(Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor)*. The defendant had served on the plaintiff a notice to produce documents as well as a letter asking for further and better particulars. These were steps taken to determine what the exact claim against the defendant was. Such action by the defendant did not amount to it having taken any positive steps in the proceedings. (paras 25, 26 & 30)

(3) In the circumstances of this case, the court had directed that the defence be filed. This act of filing the defence should be viewed of in the context of 'other action' as set out in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor.* The filing of the defence on the express instructions of the court was not indicative of an unequivocal intention to proceed with the suit and to abandon its right to have the dispute disposed off by arbitration. As such, the said filing of defence did not amount to the defendant having taken a positive step in the proceedings. (para 30)

(4) The entry of unconditional appearance by the defendant herein did not amount to it having taken positive steps in the proceedings which would deny it the right to apply for a stay of proceedings pending remission to arbitration *(Sanwell Corporation. Trans Resources Corporation Sdn Bhd & Anor)*. The defendant had served on the plaintiff a notice to produce

documents as well as a letter asking for further and better particulars. These were steps taken to determine what the exact claim against the defendant was. Asking for particulars or for inspection of documents could be seen as amounting to an unequivocal intention to proceed with the suit. Such action by the defendant did not amount to it having taken any positive steps in the proceedings. (paras 23 & 24)

Case(s) referred to:

Agibs Engineering & Construction Sdn Bhd v Paragon Advance Solutions Sdn Bhd [2011] 1 LNS 1019 CA ***(refd)***

Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd [2010] 7 CLJ 785 CA ***(foll)***

Chuan Hup Agencies Pte Ltd v. Global Minerals (Sarawak) Sdn Bhd [1989] 1 LNS 117 HC ***(refd)***

Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 HC ***(foll)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

Legislation refered to:

Arbitration Act 2005, ss. 6, 10(1)

For the plaintiff - Zolkapeli Amir; M/s Firdaus Shanti Bhupin
For the defendant - Gideon Tan; M/s Gideon Tan Razali Zaini

Reported by Suhainah Wahiduddin

JUDGMENT

Amelia Tee Abdullah J:

[1] The plaintiff, Life Plaza Sdn Bhd, claims against the defendant, Pasukhas Construction Sdn Bhd, for a sum of RM6,450,000, interest and costs as Liquidated and Ascertained Damages ("LAD") for the late completion of the project described as 'Cadangan Mendirikan 1 Blok Bangunan 6 Tingkat Mengandungi Ruang Pameran, Pejabat, Expo, Auditorium dan 2 Tingkat Aras Bawah Tanah Ruang Letak Kereta di atas Lot 1027, Seksyen 69, Jalan Loke Yew, Kuala Lumpur' ("the project").

[2] *Vide* a summons-in-chambers (encl. 4) the defendant has applied for a stay of all proceedings in this case pending remission to arbitration pursuant to s. 10 of the Arbitration Act 2005 which application is opposed by the plaintiff.

The Defendant's Arguments

[3] The defendant's application is premised on its claim that the construction agreement between the parties contains an arbitration clause. According to Enoch Tan Jee Chai, the defendant's project manager in his Affidavit in Support (encl. 5), the plaintiff, and the defendant had agreed in cl. 1 of the letter of award to adopt the Building Contract (Private Edition with Quantities – Edition 1998; Revised October 1998 ("PAM Contract"). And pursuant to cl. 34.1 of the PAM Contract, the parties had agreed to refer any dispute relating to the project to arbitration.

[4] The defendant contends that both the governing law and the authorities (*Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83) are in support of its application.

[5] Secondly, the defendant contends that it has not taken any steps in the proceedings which could bar it from applying for a stay of proceedings. Although the defendant had entered appearance in this case, it contends that the authorities (*Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213; *Chuan Hup Agencies Pte Ltd v. Global Minerals (Sarawak) Sdn Bhd* [1989] 1 LNS 117; *Agibs Engineering & Construction Sdn Bhd v Paragon Advance Solutions Sdn Bhd* [2011] 1 LNS 1019 would support its argument that the entry of appearance does not prejudice its right to apply for a stay of proceedings to refer the case to arbitration.

[6] As regards its filing of the defence, the defendant contends that the defence was filed and served pursuant to the strict instructions of the court to do so on or before 30 January 2012 failing which judgment in default of defence would be entered against it. In complying with the directions of the court, the defendant had nevertheless stated in the said defence that it was filed without prejudice to its rights and interests in applying for a stay of proceedings pending remission of the dispute to arbitration. As such, the defendant contends that it had not elected to proceed with this matter before this court and neither had it exhibited an unequivocal intention to proceed with the matter or to abandon its rights to have the matter disposed off by arbitration.

The Plaintiff's Arguments

[7] It is the plaintiff's case that the PAM Contract does not bind the parties as it is a separate contract from the letter of offer and would need to be signed by both before it could bind the parties. As such, the plaintiff argues that until the formal PAM contract is prepared and signed, it is only the letter of award and the tender documents which would form the contract documents in this case.

[8] The plaintiff further contends that the defendant had taken various steps in these proceedings before making the application for stay and as such, the defendant had submitted to the jurisdiction of this court. Among the steps taken by the defendant are:

(i) On 4 January 2012, the defendant had filed a *Notis Untuk Mengemukakan Dokumen Yang Disebut Dalam Pliding* which was responded by the plaintiff on 10 January 2012;

(ii) On the first case management date on 4 January 2012, solicitors for the defendant had asked the court for time to file its defence and the court had directed the defendant to file its defence before the next case management date on 30 January 2012;

(iii) On 30 January 2012, the defendant had not filed its defence as directed by the court. Solicitors for the defendant had asked the court for time to file its defence and the court had directed that the defence be filed by 4pm that same day; and

(iv) The defence was filed on 30 January 2012.

[9] The plaintiff argues that the defendant asking for time amounts to taking positive steps in the proceedings. They argue that the defendant should have filed its application for stay before the due date for filing the defence, that is, before 14 January 2012. As such, the plaintiff contends that the defendant had taken various positive steps in the proceedings as itemised above and by such action had submitted to the jurisdiction of the court and waived its right (which was denied) to refer the dispute to arbitration.

Findings

[10] In deciding whether the contract between the parties contains an arbitration clause, the court has carefully perused all the relevant documents in this case and their provisions. The court notes that the letter of award contains the following cl. 1:

> General Conditions
>
> This contract is let on the basis of the original tender documents and drawings with your design proposal for post-tensioning system from Floor Level 1 to level 7 inclusive and the Roof. The form of contract shall be the PAM Form with Quantities: 1998 Edition (refer to Clause B.1.1 on Page 1/5 of the Preliminaries) with the Contractor's Designed portion supplement (a copy of this supplement is available to you for your inspection on application to the quantity surveyor).
> (emphasis added)

[11] The court refers to cl. B.1.1 on p. 1/5 of the preliminaries which states as follows:

> The form of contract will be the Agreement and Conditions of Building Contract (Private Edition with Quantities - Edition 1998; Revised October 1998) issued under the sanction of Pertubuhan Arkitek Malaysia and amendments, modifications, amplification notes in Section C.3 and supplementary in Section C.4.

[12] Further to the above two provisions, reference is then made to cl. 34.1. of the PAM Contract which reads as follows:

> In the event that any dispute or difference arises between the Employer, or the Architect on his behalf, and the Contractor, either during the progress or after completion or abandonment of the Works regarding:
>
> 34.1(i) any matter or thing of whatsoever nature there under or in connection therewith, including any matter or thing left by this Contract to the discretion of the Architect; or
>
> 34.1(ii) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled; or
>
> 34.1(iii) the measurement and valuation in sub-clause 30.5(i); or

34.1(iv) the rights and liabilities of the parties under Clauses 25.0, 26.0, 31.0 or 32.0; or

34.1(v) the unreasonable withholding of consent or agreement by the Employer or the Architect on his behalf or by the Contractor,

then such dispute or differences shall be referred to arbitration.

[13] The defendant argues that the arbitration clause found in cl. 34.1 of the PAM Contract is valid and binding between the plaintiff and the defendant. The plaintiff, on the other hand, contends that the PAM Contract and the Bil. 1 Preliminaries and General Conditions had never been prepared and signed by the parties. As such, it is the plaintiff's case that it is only the letter of award and the original tender documents that would form the contract between the parties.

[14] In considering whether there is basis in the plaintiff's arguments, the court has carefully perused the case of *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785. The facts of the afore-cited case would appear to be on all fours with our instant case. In *Albilt Resources (supra)* the defendant who was the main contractor had appointed the plaintiff as its subcontractor *via* a letter of award dated 4 June 2004 ("the June contract") for certain construction works. Pursuant to the contract the plaintiff had claimed a sum of RM334,273.37 from the defendant. Upon receiving the plaintiff's writ and statement of claim and before filing its defence, the defendant had applied for a stay pending arbitration. The issue that arose for determination was whether the word "executed" in cl. 1 of the June contract and cl. 9 of the contract meant "signed". Clause 1 provided that the contract is executed based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd and Redez Properties and all correspondences including the letter of award between Albilt Resources and Redex Properties. It was also provided that the contract shall be based on the Agreement and Conditions of Building Contract (Without Quantities) published by Pertubuhan Arkitek Malaysia ("PAM Contract"), together with amendments, additions or modifications. The defendant claimed that under s. 9 of the Arbitration Act 2005, a true construction of cls. 1 and 9 would lead to the

A conclusion that the June contract was subject to an arbitration agreement. The plaintiff on the other hand took the position that the word "executed" in cls. 1 and 9 meant "implemented, performed or carried out" and not "signed" and disputed that there was an arbitration agreement.

B

[15] In *Albilt Resources,* it was held by Low Hop Bing JCA that the word "executed" meant "made or brought into existence". His Lordship held that the June contract had been "executed", that is, signed, sealed and delivered or brought into existence by the C parties concerned. The parties, having "executed" the June contract, had in effect adopted an incorporated all the other relevant documents specifically stipulated therein including the PAM Contract. As stated by His Lordship at p. 795:

> D When all the aforesaid documents are construed conjunctively, it is abundantly clear that the terms of the PAM Contract have been incorporated as part and parcel of the June contract.

And at p. 796:

> E Under s. 9(1), "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between then in respect of a defined legal relationship, whether contractual or not. Clause 34 of the PAM Contract which sets out the arbitration clause clearly comes within the meaning of "arbitration agreement" in s. 9(1).

F

[16] The court further notes that His Lordship T Selventhiranathan JCA in *Albilt Resources* had gone on to say that the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document, and the G agreement is in writing, and the reference incorporated the said clause into the agreement.

[17] The court is of the view that the decision of the Court of Appeal in *Albilt Resources (supra)* is clearly applicable to the facts of our instant case. The court is satisfied that *vide* the letter of H award dated 22 August 2006 duly executed by the parties, there was clear agreement to incorporate the PAM Form with quantities. And pursuant to cl. 34.1 of the PAM Contract, the parties had agreed to refer any dispute between them to arbitration.

I

[18] Based on the foregoing and relying on the case of *Albilt Resources*, the court is satisfied that it is not necessary for the letter of award itself to have an arbitration clause. The court is satisfied that the adoption of the PAM Contract in the letter of award and the existence of an arbitration clause in the PAM contract would be sufficient for the court to arrive at the conclusion that the agreement between the parties in this case does contain an arbitration clause.

[19] Having found that the agreement between the parties contains an arbitration clause, the next question for determination by the court is whether the defendant has taken any other steps in the proceedings before making the application for stay. Section 10(1) of the Arbitration Act 2005 reads as follows:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
> (emphasis added)

The operative words are "before taking any other steps in the proceedings".

[20] Learned counsel for the plaintiff has pointed out that the defendant had taken positive steps in the proceedings which should be taken as their submission to the jurisdiction of the court. Among the steps which the defendant is alleged to have taken is the notice to produce documents filed on 4 January 2012, the application on 4 January 2012 for time to file its defence and the further application on 30 January 2012 for extension of time to file its defence. Although the filing of the defence on 30 January 2012 was done following the direction of court to do so else judgment in default would be entered, nevertheless it is submitted that the defendant should have filed its stay application before the expiry of the time period limited for filing the defence.

[21] In determining whether the defendant had taken positive steps, the court has carefully examined the various steps taken by the defendant in this case. It is true that the defendant had entered appearance. In this regard, the court has perused the case

of *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 cited by the defendant. There the defendant had entered unconditional appearance and subsequently applied for stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 to allow the dispute to be referred to arbitration. At the High Court, the application was allowed but on appeal, the Court of Appeal set aside the decision of the High Court on the ground that the entry of appearance should have been conditional.

[22] On appeal by the defendant, the Federal Court held that if the appellant did not take any positive steps to defend itself by entering appearance, judgment in default of appearance might be entered against it. The entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. His Lordship Mohtar Abdullah FCJ found that the entry of unconditional appearance was a permitted, excluded or an exempted step in the proceedings that did not amount to a step in the proceedings within the meaning of s. 6 of the Act and would not prejudice the appellant's right to apply for a stay of the proceedings. The Federal Court in *Sanwell Corporation* thus reaffirmed the unreported Federal Court decision in *Sime Axa Assurance Berhad v. Interscope Versicherung Sdn Bhd* (Federal Court Civil Appeal No. 02-08-2000 (W)).

[23] Thus, based on the authority of *Sanwell Corporation (supra)*, the court finds that the entry of unconditional appearance by the defendant in this case does not amount to it having taken positive steps in the proceedings which would deny it the right to apply for a stay of proceedings pending remission to arbitration.

[24] However, it is noted that in the case of *Sanwell Corporation*, His Lordship Mohtar Abdullah FCJ had gone on to say that if the appellant had served any pleadings, he would have clearly taken a step in the proceedings and elected to proceed with the proceedings in the High Court and would therefore be barred from applying for a stay of proceedings to refer the dispute to arbitration. If he has taken any other action other than the entry of appearance and the filing of pleadings, then the court would have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon its right to have the dispute disposed off by arbitration.

[25] In this case the defendant had also served on the plaintiff a notice to produce documents mentioned in the pleadings as well as a letter asking for further and better particulars. The court notes the arguments of learned counsel for the defendant that these were steps taken to determine what the exact claim against the defendant was. The court is of the considered view that this step taken by the defendant would fall within the category of "other action" as stated by the Federal Court in *Sanwell Corporation*. And to determine if the serving of the said notice and letter amounts to its having taken a positive step, the court would have to consider whether such action indicates an unequivocal intention to proceed with the suit and to abandon its right to refer to arbitration.

[26] In this regard, the court is in agreement with learned counsel for the defendant that the serving of the notice and letter on the plaintiff does not amount to the defendant having taken positive steps. The court is unable to see how asking for particulars or for inspection of documents could be seen as amounting to an unequivocal intention to proceed with the suit. As such, on this score, the court finds that such action by the defendant does not amount to it having taken any positive steps in the proceedings.

[27] And finally, we come to the issue of the defendant filing its defence on 30 January 2012. The court has carefully perused all the documents filed in this case. The court notes that the defendant's application for stay of proceedings was filed on 18 January 2012 and was fixed for hearing on 30 January 2012. However, the sealed copy was served on the plaintiff's solicitors only on the morning of 30 January 2012. The hearing of encl. 4 could not be proceeded with on that date because the plaintiff had yet to file its affidavit in reply. In any event the defendant's solicitors, Messrs Gideon Tan Razali Zaini, had sent Noor Aisha, a pupil in chambers to attend to the matter. As such, it was crystal clear that the fact that encl. 4 was not ready for hearing on 30 January 2012 was known to and acknowledged by the defendant by their act of sending the pupil in chambers for the hearing.

[28] On the other hand, the court notes that it had, on 4 January 2012, directed the defendant to file and serve its defence within two weeks. Yet, on 30 January 2012 (which was in excess of two weeks), the defendant had yet to file its defence. Upon the plaintiff's solicitors applying for judgment in default to be entered against the defendant, the court had directed the defendant to file its defence by 4pm on 30 January 2012 or else judgment in default would be entered.

[29] It is thus in the face of these facts and circumstances that the defence was filed on 30 January 2012. Paragraph 7 of the defence reads as follows:

> Defendan memfailkan Pembelaan ini tanpa prejudis kepada hak-haknya dan/atau kepentingannya dalam permohonannya untuk suatu penggantungan prosiding sementara menunggu remisi kepada TimbangTara melalui Saman Dalam Kamar bertarikh 18.1.2012 dan Pembelaan ini adalah difailkan menurut arahan Mahkamah Yang Mulia ini yang diberikan pada 30.1.2012.

[30] With the benefit of hindsight, the court finds that since the defendant's application for stay had been filed before it had taken any positive steps in the proceedings; the court should have allowed encl. 4 to be heard before directing the defendant to file its defence which could be considered as taking a positive step in the proceedings. In the circumstances of this case and the court's own role in directing that the defence be filed, the court is of the considered view that this act of filing the defence should be viewed in the context of "other action" as set out in *Sanwell Corporation (supra)*. In light of para. 7 of the defence and the many protestations from learned counsel that there had been no abandonment of its rights to refer the dispute to arbitration, the court finds that the filing of the defence on the express instructions of the court was not indicative of an unequivocal intention to proceed with the suit and to abandon its right to have the dispute disposed off by arbitration. As such, the court finds that the filing of the defence in the circumstances of this case does not amount to the defendant having taken a positive step in the proceedings.

Conclusion

[31] As such, having due regard to the events that have unfolded in this case, the authorities cited by the parties and the clear provisions of s. 10 of the Arbitration Act 2005, the court herewith allows prayers (a) and (b) of encl. 4.